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No. _____

In The

Supreme Court of the United States

GERALD RAYBORN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a money laundering prosecution under Title 18 U.S.C. § 1957, where the underlying specified criminal activity is mail fraud, under Title 18 U.S.C. § 1341, does a defendant have the requisite control over the proceeds of the mail fraud offense after he or she causes to be mailed a fraudulent loan application and *at the moment* that the financial institution approves the loan?

2. When the trial court gives a jury instruction on deliberate ignorance, is the instruction harmless as a matter of law so long as the instruction accurately states the law, even if there is no evidence in the record to support a claim of deliberate ignorance?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Gerald Rayborn, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 2, 2007, a copy of which is attached herewith. The decision is reported as *United States v. Rayborn*, 491 F.3d 513 (6th Cir. 2007).

OPINION BELOW

The Court of Appeals for the Sixth Circuit entered its order affirming the judgment of the district court on July 2, 2007. A copy of the opinion, *United States v. Rayborn*, 491 F.3d 513 (6th Cir. 2007), is annexed in the appendix.

JURISDICTION

On July 2, 2007, the Court of Appeals for the Sixth Circuit entered its ruling affirming the district court. The court denied the petitioner's petition for rehearing and suggestion for rehearing *en banc* on November 23, 2007. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are –

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section –

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any

transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section *1956* of this title.

STATEMENT OF THE CASE

Nature of the Case

Gerald Rayborn appealed his convictio in the United States District Court for the Western District of Tennessee before the Honorable Bernice S. Donald. The Judgment Including Sentence under the Sentencing Reform Act was docketed on October 19, 2005, and a timely Notice of Appeal was filed on October 27, 2005 before the Sixth Circuit Court of Appeals.

Proceeding and Disposition in the trial court

On April 7, 2004, a federal grand jury in the Western District of Tennessee returned an indictment charging the petitioner with violations of Title 18 U.S.C. § 371, conspiracy, Title 18 U.S.C. § 1341, mail fraud, and Title 18 U.S.C. § 1957, engaging in a

monetary transaction in criminally derived property with a value greater than $10,000.

The petitioner entered a plea of not guilty, and he went to trial in the district court on July 11, 2005. On July 14, the jury returned a verdict of guilty as to all four counts of the indictment. The district court sentenced the petitioner on October 18, 2005, to nine months imprisonment followed by three years of supervised release.

Proceeding and Disposition in the Sixth Circuit Court of Appeals

The petitioner filed a notice of appeal on October 19, 2005, and on July 2, 2007, the Sixth Circuit Court of Appeals entered its opinion in *United States v. Rayborn*, 491 F.3d 513 (6th Cir. 2007), affirming the judgment of the district court. The petitioner filed a timely petition for rehearing with suggestion for rehearing *en banc*, and the court denied the petition on November 23, 2007.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

Relevant Facts

The petitioner's jury trial began on July 11, 2005. During the opening statement in the petitioner's behalf, counsel pointed out what he believed the evidence would show. The petitioner and his wife,

Bonnie Rayborn, were married in 1967, and he had been the pastor of Mt. Sinai Missionary Baptist Church for almost thirty years. In July, 2001, the church voted to give him a raise from $500 per week to $2,000 per week. Throughout their marriage, they had never filled out their own income tax returns. (Transcript, Trial [TR], Vol. I, 7/11/05, DEFENSE COUNSEL, pages 27-28).

The Rayborns had lived at 102 Armstrong in the Whitehaven area in Shelby County since 1971, and after the petitioner received his raise, he asked his current accountant, Larry Bullock, about the feasibility of remodeling their home. Bullock responded that it would be wiser, because of the petitioner's higher salary, to buy a new home and receive interest deductions on his tax returns. Marion Brown, a mortgage broker, was a client of Bullock and happened to be in the office when he talked to the Rayborns. (TR, Vol. I, 7/11/05, DEFENSE COUNSEL, pages 28-29). Bullock introduced Brown to the Rayborns, and within days she had prepared a loan application in her own handwriting. Whatever information she placed on the application was what she received from Bullock. She had the Rayborns sign the application, and she introduced them to Vinnie Flynn, a real estate agent who was a friend of Browns. The Rayborns trusted these people, and they did what Bullock and Brown suggested them to do. The Rayborns bought a house in Collierville, and Brown, as the broker, charged $16,000 in fees. Brown and Flynn took some tax returns one day for Rev. Rayborn to sign. He signed

the returns, but Ms. Rayborn was not there. The evidence would show that Bullock later forged her name on the returns. The returns were not sent in by the Rayborns, but they were handled by either Bullock or Brown (TR, Vol. I, 7/11/05, DEFENSE COUNSEL, pages 29-31).

The petitioner was presented with numerous documents to sign, and these were prepared at the behest of Bullock or Brown. Counsel said that the Rayborns were "people that were trying to purchase a new home and signing documents which they put in front of them." The actual conspirators in the case were Bullock and Brown, not the petitioner. (TR, Vol. I, 7/11/05, DEFENSE COUNSEL, pages 34-35).

Vinnie C. Flynn, an affiliate broker with Lawrence Johnson Realtors was the first witness called in the government's case in chief. He was introduced to the Rayborns by Marion Brown, a broker for a mortgage company, and he acted as the real estate agent for the Rayborns. The Rayborns were interested in homes in the Collierville area, and Flynn showed them about ten homes in that vicinity. The Rayborns liked a home they saw on Forest Wind in Collierville, and the asking price of the home was $575,000. The Rayborns offered $475,000 and the owners, Albert and Laura Chinn, countered with $525,000. The Rayborns accepted that deal. (TR, Vol. II, 7/11/05, FLYNN, pages 6-12).

When the purchase price was established, the sale was set for closing on April 29, 2002. The closing

date had to be extended because the mortgage company had not received all the documents which they needed. The sales contract required the seller to pay a mortgage broker fee of $16,000 (TR, Vol. II, 7/11/05, FLYNN, pages 14-16). Flynn was present when Marion Brown went to the Mt. Sinai Missionary Baptist Church to have the petitioner sign some loan documents. The loan was closed at a later date. (TR, Vol. II, 7/11/05, FLYNN, pages 24-25).

Stacy Johnson, the Rayborns' daughter, testified that she was employed at the Nail Boutique and had lived at 102 Armstrong Road since 2002. Her parents used to live at the home, but she moved there in May, 2002. Her parents still own the property and she has not signed a lease. Government counsel showed her a document which purported to have her signature, but she testified that she did not sign the document. (TR, Vol. II, 7/11/05, JOHNSON, pages 49-51).

The trial resumed on July 12, 2005. David Crockett worked as a branch manager for Wells Fargo during the time of the events charged in the indictment. His primary duties were to supervise the origination and processing and closing of mortgage loans. (TR, 7/12/05, CROCKETT, pages 93-94). Crockett spoke of the documents which he would need from an individual who applied for a loan. In the case of a self-employed person, the primary document he would need to see was the income tax returns for at least the past two years. Copies of the returns sent to the federal government are the ones which he normally requests. He identified the mortgage loan files

of the petitioner which had been purchased by Wells Fargo from the mortgage broker. (TR, 7/12/05, CROCKETT, pages 99-101, 105).

The petitioner's projected income on the loan application was listed at $8,500 per month. (TR, 7/12/05, CROCKETT, page 111, APX, page). Wells Fargo spoke to the petitioner's accountant, Larry Bullock, who confirmed the amount of compensation and the fact that the petitioner worked at the Mt. Sinai Missionary Baptist Church. There was some correspondence in the file from the petitioner where he explained to an underwriter that he would not be renting the "current home," *i.e.*, 102 Armstrong, but that a member of his family would be living there. He intended to keep the Armstrong home and purchase the new home in Collierville. (TR, 7/12/05, CROCKETT, pages 114-116).

The documents in the loan file showed that the petitioner's gross amount of self-employed income in 2000 was $84,274. The return was signed by both the petitioner and the CPA, Bullock. The petitioner's gross income before deductions was $104,000. There was a Schedule E on the 2000 return which showed a supplemental income from rental property on Horn Lake Road. (TR, 7/12/05, CROCKETT, pages 117-119). The adjusted gross income on the 2001 tax return, before self-employment tax, was $103,206. There was a housing allowance of $15,000, which the petitioner received because he was a minister, and he also reported an income of $28,910 from Nail Boutique.

He had an average income of $6,778 per month. (TR, 7/12/05, CROCKETT, pages 120-122).

Both Gerald and Bonnie Rayborn signed the promissory note for the Collierville property, and the monthly payment for principal and interest was $3,318.20. Crockett identified copies of the 2000 and 2001 tax returns from the Internal Revenue Service. The prior 2000 return had a amount of $84,274 on line 22 of the from, but the form from the IRS had the amount of $7,462 on line 22. The gross income was $33,800 instead of $104,00 on the other tax form. The 2000 return also showed income from rental property on Horn Lake Road, which was "$42,000 gross, with a net of $477." There were other discrepancies between the two forms. (TR, 7/12/05, CROCKETT, pages 132-139). Crockett examined the 2001 form from the IRS, and it differed in similar ways to the 2000 forms. (TR, 7/12/05, CROCKETT, pages 140-143).

Crockett testified that the loan file would have been received by overnight mail from the Atlanta office. The loan of approximately $498,750 was ultimately wired from Wells Fargo to the closing attorney in Memphis within twenty-four hours of May 20, 2002, to pay off the mortgage on the new home. (TR, 7/12/05, CROCKETT, pages 146-148). Crockett identified another loan application from the Rayborns which was signed on August 29, 2002, which showed a gross income of $9,355 per month. There was a gross amount of $1,300 per month rental income from the Armstrong property. This application was declined because of excessive obligations of the Rayborns in

relation to their income. The rental lease with the submitted documents listed the address as 108 Armstrong. (TR, 7/12/05, CROCKETT, pages 149-154).

On cross-examination, Crockett read from a document in the loan file which said that the Rayborns were not going to sell the Armstrong home, and they would have an $75,000 line of credit. There was a letter from the petitioner dated May 14, 2002, which clarified that his daughter would be living in the Armstrong home, and he would not be renting it. (TR, 7/12/05, CROCKETT, pages 167-170). Janelle Jones was the underwriter who received this May 14th letter from the petitioner. (TR, 7/12/05, CROCKETT, pages 179-180).

One day after receiving the letter of May 14th, Jones received a document which indicated that the Armstrong home would be rented. Marion Brown may well have been the person who provided this information which was contrary to the petitioner's May 14th letter. Crockett agreed with petitioner's counsel's statement that there was no logical explanation why Marion Brown was telling the lenders something different from the petitioner's letter of May 14th. (TR, 7/12/05, CROCKETT, pages 184-186).

Crockett examined the loan application form related to the first closing and found a universal residential loan agreement dated May 20, 2002, which included $1,300 rental income for the house on Armstrong. Crockett had said that he did not have a copy of the lease at the time of the May 20 closing.

(TR, 7/12/05, CROCKETT, pages 220-221). The dates on the lease were May 15, 2002, and June 15, 2002. Crockett said that he did not know how this document, which was contrary to the petitioner's May 14 letter, got into the file. (TR, 7/12/05, CROCKETT, pages 244-246).

With regard to the second loan, the lease listed an erroneous address of 108 Armstrong, and Stacy Johnson's name was misspelled. Johnson's supposed signature on the loan was obviously different from her other signatures in the file. (TR, 7/12/05, CROCKETT, pages 247-248).

Crockett said that Wells Fargo calculated the petitioner's income on May 29, 2002, as $6,600, but it received another document which showed that the petitioner had an income of $11,702. The only source with whom Wells Fargo communicated was Marion Brown, who apparently told agents of Wells Fargo that the amount should be substantially increased. Crockett said that he found this situation to be "very unusual." (TR, 7/12/05, CROCKETT, pages 253-256).

The trial resumed on July 13, 2005, with the testimony of Ursula Jones, an real estate closing attorney who works for Equity Title and Escrow. She handled the closing transaction for the petitioner, who was the only buyer on the loan. Ms. Rayborn also signed several documents in the loan package as required by Tennessee law. (TR, 7/13/05, JONES, pages 306-310). Wells Fargo provided her the loan documents, from which she prepared the settlement

sheets, and the company also wired her $493,276.43 on May 20, 2002. She disbursed the money in accordance with the instructions provided on the settlement sheet. (TR, 7/13/05, JONES, pages 311-314).

Jones then talked about the refinancing agreement which included both Gerald and Bonnie Rayborn as the owners of the home. Wells Fargo wired her $483,171.08 on October 13, 2002, and she again disbursed the money in accordance with the settlement sheet instructions. This disbursement included a payoff of the mortgage to Wells Fargo. (TR, 7/13/05, JONES, pages 320-323). The amount of the refinancing loan was $749,376, and it was for 180 months, or 15 years. (TR, 7/13/05, JONES, page 331).

Jones testified on cross-examination that the petitioner had to sign approximately 80 documents at the closing of May 20, 2002. She put the documents in front of the Rayborns, turned to the signature page, and they signed the documents without reading them. (TR, 7/13/05, JONES, pages 334-335). Wells Fargo sent her a loan three days prior to the May 20th closing date. She did not review the document, and it was signed at her instruction along with the 80 other documents. (TR, 7/13/05, JONES, pages 340-342).

Charlotte Ware testified that she was a forensic document examiner with the United States Postal Inspection Service Forensic Laboratory. (TR, 7/13/05, WARE, page 370). The parties entered into a stipulation which included the fact that known exemplars of

the handwriting of Larry V. Bullock, Bonnie Rayborn, and Gerald Rayborn were submitted to Ware. (TR, 7/13/05, WARE, pages 376-378). Certain tax returns were labeled with a "Q" designation, and Ware made findings that: (1) Bonnie Rayborn probably did not write the signature on documents Q-1 or Q-2; (2) Bullock wrote Ms. Rayborn's signature on Q-2, and probably Q-1; (3) Gerald Rayborn wrote his signature on Q-1 and Q-2; (4) Gerald Rayborn probably wrote his signature on Q-3, but Ware did not know whether he wrote Ms. Rayborn's signature on Q-1 and Q-2. (TR, 7/13/05, WARE, pages 396-402). The documents Q-1, Q-2, and Q-3 were the Rayborns' tax returns for 2000 and 2001. (TR, 7/13/05, WARE, pages 414-415).

On cross-examination, Ware said that she was not aware of the circumstances under which the petitioner signed the tax returns, and she did not know whether he read the forms or not before signing them. In fact, the petitioner did not date the returns even though the forms called for a date. She found no evidence that the petitioner attempted to disguise his handwriting in the exemplars which were submitted to her. (TR, 7/13/05, WARE, pages 417-421).

After Ware's testimony, the government rested its case. The petitioner's proof began with, Sukie Mollendor, who testified that she was the real estate agent for Dr. Chinn and his wife, Nora Chinn, who owned the property at 9368 Forest Wind Drive in Collierville, Tennessee. She was the listing agent of the property, and the Rayborns' were represented by

agent Vinnie Flynn. The Rayborns and the Chinns were able to negotiate a contract for the sale of the property. (TR, 7/13/05, MOLLENDOR, pages 435-438).

Stacy Johnson testified that she was the petitioner's daughter and a member of the Board of Directors for the Mt. Sinai Missionary Baptist Church. She was shown certain documents which purportedly were signed by her as well as letters from the church. She said that she did not recognize the handwriting on the documents, nor had she seen any such documents in connection with the church's finances or checking accounts. (TR, 7/13/05, JOHNSON, pages 450-454).

Reverend Floyd Knox testified that he was an associate minister of the Mt. Sinai Missionary Baptist Church, as well as a member of the board of trustees. Before July, 2001, the church paid the petitioner $500 a week, and after July, 2001, his salary was increased to $2,000 a week. The board of trustees recommended the salary increase to the church, and the church agreed. (TR, 7/13/05, KNOX, pages 462-463).

Bonnie Rayborn testified that she had been married to the petitioner since December 16, 1967, and he had been pastor of the church for 28 or 29 years. For the past 37 years, the Rayborns had not prepared their own income tax returns because they did not understand how to prepare the forms. They had used a number of accountants for this purpose, but they were using Larry Bullock in 1999. Prior to

May, 2002, the Rayborns had lived at 102 West Armstrong Road for 31 years. The house was paid for, and her daughter presently lives there. (TR, 7/13/05, BONNIE RAYBORN, pages 465-467).

In the spring of 2002, when the Rayborns were preparing to remodel their home, Larry Bullock advised them that it would be better to buy a new home rather than to remodel their old one. She and the petitioner went to Bullock one day for the purpose of preparing their taxes, and Bullock introduced them to Marion Brown, who happened to be in the office at the time. Mr. Rayborn met with Brown five other times; three times in her husband's office and twice in the new home. Brown had her and the petitioner sign some documents from time to time, and they did not read and examine the documents before signing them. (TR, 7/13/05, BONNIE RAYBORN, pages 467-469).

Brown introduced the Rayborns to Vinnie Flynn, a real estate agent. The Rayborns believed that Bullock would provide all financial data and information connected to the loan. Brown did not ask Ms. Rayborn about any other property or real estate which she and her husband owned, and she did not review or examine the loan applications which Brown may have had her to sign. (TR, 7/13/05, BONNIE RAYBORN).

On redirect examination, Ms. Rayborn testified that she and her husband got rid of Bullock after the problems in this case arose. She relied upon Bullock

to fill out the forms correctly. Throughout the years, whenever she and her husband have signed tax returns, her husband has not read the forms before signing them. Neither one of them have ever attempted to prepare a tax return. (TR, 7/13/05, RAYBORN, pages 525-27).

On July 14, 2005, the district court met with counsel to discuss the jury charge. Defense counsel objected to the proposed instruction on deliberate ignorance. Counsel said that the basic issue before the jury was whether the petitioner knew that the returns he signed were not the ones which were submitted to the IRS. There is no evidence in this case that the petitioner deliberately avoided obtaining knowledge of the content of the returns. After extended argument, the court overruled the petitioner's objection. (TR, 7/14/05, COURT AND COUNSEL, pages 19-29).

At the completion of the proof, the district court gave its final instructions to the jury. The court charged the jury on deliberate ignorance and the rebuttable presumption of knowledge of the content of the tax returns:

> Next, I want to explain something about proving a defendant's knowledge. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the tax returns he signed for the years 2000 and 2001, which were submitted to Wells Fargo with

his mortgage application and later refinance application, were false, then you may find that he knew those tax returns bearing his signature that were submitted to Wells Fargo with a mortgage application and a refinance application were, in fact, not the same returns he filed with the IRS.

But to find this you must be convinced beyond a reasonable doubt that the defendant was aware of the high probability that the tax returns he signed for the years 2000 and 2001, which were submitted to support his application for a mortgage and the application to refinance the loan, were false, and that the defendant deliberately closed his eyes to what was obvious.

Carelessness or negligence or foolishness on his part is not the same as knowledge and is not – this, of course, is all for you to decide.

Now, the fact that an individual's name is signed to a return means that unless and until outweighed by evidence in the case which leads you to a different or contrary decision, you may find that a filed tax return was, in fact, signed by the person whose name appears to be signed on it.

If you find proof beyond a reasonable doubt that the defendant signed this tax return, that is evidence which you may, but are not required to, find or infer that the defendant had knowledge of the contents of this return.

(TR, 7/14/05, Jury Instructions, DISTRICT COURT, pages 41-43).

Argument

ISSUE ONE: In a money laundering prosecution under Title 18 U.S.C. § 1957, where the underlying specified criminal activity is mail fraud, under Title 18 U.S.C. § 1341, does a defendant have the requisite control over the proceeds of the mail fraud offense after he or she causes to be mailed a fraudulent loan application and *at the moment* that the financial institution approves the loan?

The Sixth Circuit held that the evidence was sufficient to sustain the jury verdict on the charged offense of money laundering under Title 18 U.S.C. § 1957. The court gave the five elements of the offense:

> (1) Rayborn was engaged in a monetary transaction; (2) Rayborn knew that the transaction involved criminally derived property; (3) the property was greater than $10,000; (4) the property was derived from a violation of 18 U.S.C. § 1341 (mail fraud); and (5) the transaction occurred within the United States.

The only element in dispute was the second one; *i.e.*, whether the alleged monetary transaction involved "criminally derived property." *Rayborn*, 491 F.3d at 517. The court in *United States v. Prince*, 214 F.3d 740, 747 (6th Cir. 2000), quoted *United States v. Butler*, 211 F.3d 826, 829 (4th Cir. 2000):

> Congress did not fashion the money laundering statute to create a new source of criminal liability for every fraudulent monetary transaction. Rather, both the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring *after* proceeds have been obtained from the underlying unlawful activity.

Prince, 214 F.3d at 748 (emphasis in *Prince*). The government was not required to show that the petitioner had actual control of the funds. *Id*. *See United States v. McGahee*, 257 F.3d 520, 528 (6th Cir. 2001), citing *United States v. Mankarious*, 151 F.3d 694, 703 (7th Cir. 1998), and *United States v. Christo*, 129 F.3d 578, 580 (11th Cir. 1997) (the proceeds must come from "a separate act completed after the crime.").

The court characterized the government's theory of the case:

> The government's theory of the case is that Rayborn committed his underlying felony, mail fraud, by sending fraudulent documents to Wells Fargo in order to procure a loan. As a result of that criminal offense he received proceeds – the $498,750 loan. Then, subsequent to obtaining these criminally derived proceeds, the money was transferred by Wells Fargo to the closing agent in order to facilitate the purchase of the home. This

> constituted "laundering" through the commission of a monetary transaction with ill-begotten gains . . .

Rayborn, 491 F.3d at 517. The petitioner argued that he did not have the requisite control of the funds until *after* the alleged monetary transaction, that is, when Wells Fargo transferred the funds to the closing attorney. The court disagreed:

> The first step in the scheme was the commission of the underlying offense of mail fraud, which occurred when Rayborn sent fraudulent tax documents and other loan application materials to Wells Fargo. After receiving these documents, Wells Fargo approved a loan in the amount of $498,750, which constituted the proceeds of the predicate offense. *At that moment, those proceeds belonged to Rayborn; the fact that proceeds were never in Rayborn's physical possession, or even in a personal bank account, is of no moment. Prince*, 214 F.3d at 748. After all, Rayborn signed documents directing Wells Fargo to transfer the funds to the closing agent. Thus, he exercised control over the proceeds of the mail fraud. *See United States v. Savage*, 67 F.3d 1435, 1443 (9th Cir. 1995) (finding that for purposes of § 1957, where proceeds derived from mail fraud were deposited into accounts, it was irrelevant that these accounts were not in the defendant's name, since defendant exercised control over the accounts). This subsequent transaction, which ultimately resulted in the acquisition of title to

> the home, constituted the "laundering" of the proceeds of the mail fraud. For these reasons, there was sufficient evidence to sustain Rayborn's money laundering conviction.

Rayborn, 491 F.3d at 517 (emphasis added).

The issue presented in this petition is whether the petitioner had the requisite "control" of the loan proceeds after Wells Fargo's approval of the loan but prior to its transfer of the funds to the closing attorney.

The petitioner respectfully submits that *Prince*, *Savage*, nor any decision of this Court or the various judicial circuits, can justify the rationale of the *Rayborn* panel. *Prince* said that in *Savage*, "[t]he defendant recruited assistants to help him raise money, transfer it, and launder it." *Prince*, 214 F.3d at 748. Investors sent money to the assistants' bank account, and his assistants would sometimes transfer money to foreign bank accounts. This money would either be sent to the defendant's personal bank account or would be used to pay the defendant's expenses. When the defendant tried to argue that wire transfers were not sent from his personal account, the Ninth Circuit held that "the funds transferred were criminally derived property at the time they were deposited in accounts under the defendant's control . . . The court found that the funds were at the defendant's disposal because the record indicated that the parties named on the accounts transferred the money at the

defendant's request." *Prince*, 214 F.3d at 748, citing *Savage*, 67 F.3d at 1442-43.

Prince, which involved two co-defendants, found a similar level of control over funds which were wired to Prince as well as third parties:

> In the instances in which victims transferred money to Prince directly, once the victims wired the money, it constituted proceeds. The same is true when victims transferred money to a third party because Prince had sufficient control over that money. In every case in which money was transferred to a third party, the third party was someone with whom Prince had a relationship. Prince solicited the help of his sister, his brother, a niece, two sisters-in-law, his accountant, two of his employees, and an individual who Prince had known his whole life. Prince had reached a prior agreement with each of them in which the third party had agreed to transfer the money to Prince. On all occasions, the third party complied. On all occasions, whether the victim transferred the money to a third party or Prince, Prince transferred the money to White [the co-defendant]. The Defendants devised, participated in, and were in constructive control of the elaborate scheme.

Prince, 214 F.3d at 749-50.

Rayborn extends the concept of control in *Prince* and *Savage* not only to compatriots in the underlying

criminal activity and/or those who are in a "relationship" with the defendant, but also to financial institutions who are in fact the victim of the underlying criminal activity. The court's above quote from *United States v. Butler*, *supra*, 211 F.3d at 829, was taken from *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992). *Johnson* focused on the statutory requirement in Section 1957(f)(2) that the proceeds must be "obtained from a criminal offense." The ordinary, dictionary meaning of "obtain" is "to gain or attain possession or disposal of usually by some planned action or method." The court said that "Congress viewed a violation of Section 1957 as occurring only after the individual involved in the specified criminal activity gained possession or disposal of the proceeds generated by the criminal activity." *Johnson*, 971 F.2d at 568. *See id.*, at 570 ("Section 1957 appears to proscribe certain transactions in proceeds that have already been obtained by an individual from an underlying criminal offense"); and *United States v. Piervinanzi*, 23 F.3d 670, 677 (2nd Cir. 1994), citing *Johnson* ("The use of such language [in Section 1957] demonstrates a congressional intent that the proceeds of a crime be in the defendant's possession before he can attempt to transfer those proceeds in violation of § 1957.").

Two other cases cited in *Prince* illustrate the "control" which a defendant must have of criminally derived property before he can be said to "obtain" the funds as required by Section 1957. In *United States v. Smith*, 44 F.3d 1259 (4th Cir. 1995), the defendants

set up a scheme whereby they induced lenders to advance money to Lagusa, Inc. Lagusa's president, in exchange for kickbacks, transferred these funds into an account maintained by one of the defendants, who later withdrew the money. The defendants argued on appeal that they did not have possession or control of the funds which were transferred by Lagusa. In rejecting this argument, *Smith* said that "the transfer from the lenders to Lagusa was effected pursuant to a scheme to defraud, which Smith participated in and devised . . . Smith was in constructive control of the entire scheme and was therefore in constructive possession and control of the fraudulently procured funds at the time those funds were transferred in violation of the money laundering statute." *Prince*, 214 F.3d at 748-49.

Prince also cites a similar instance of money laundering in *United States v. Leahy*, 82 F.3d 624 (5th Cir. 1996). The defendant owned a roofing company, GWR, which was awarded a contract by the Veterans Administration. Because of GWR's poor record of paying suppliers, the suppliers required GWR to set up an escrow account from which GWR and the suppliers would be paid. GWR sent some fraudulent invoices to the VA, who in turn sent money to the escrow account. The funds were then transferred to GWR. Although GWR argued on appeal that it did not obtain the funds until they were deposited in its account, the Fifth Circuit disagreed: "Noting that the escrow agent had no discretion as to how to distribute the funds, the court found that GWR had sufficient

control over the escrow accounts and thus wire fraud was complete when the money was deposited in the escrow account." *Prince*, 214 F.3d at 749. The subsequent transfers from the escrow account "involved illegally obtained proceeds." *Id.*

According to *Rayborn*, the only "control" the petitioner had over the funds resulted solely from the fact that he signed documents directing Wells Fargo to transfer the money to the closing attorney. This concept of "control" cannot be squared with the holdings of other circuits which have considered the type of control necessary to "obtain" the proceeds of unlawful criminal activity. In each of the cases cited in this petition, the defendant's control of the funds and/or the accounts in which they were deposited resulted from a relationship between the defendant and the person in actual possession of the funds. In *Savage*, assistants were recruited specifically for the purpose of raising money and transferring it from the assistant's accounts to foreign bank accounts. *Prince*, 214 F.3d at 748. The person in control of the funds in *Smith* was the president of a corporation who received kickbacks in exchange for transferring criminally derived property to the defendant's account. *Id.* at 748-49. An escrow agent who had no discretion to withhold funds from the defendant was found to be sufficiently in the defendant's control in *Leahy*. *Prince*, 214 F.3d at 749.

None of the principles of control found in *Prince* exist in the present case. Wells Fargo had no relationship with the defendant, but, in fact, it was the

alleged victim of the mail fraud offense. The Fifth Circuit in *United States v. Nguyen*, 504 F.3d 561 (5th Cir. 2007), quoted *United States v. Leahy*, *supra*, to illustrate the requisite elements of money laundering:

> For a defendant to violate the statute, "the funds in question must already be proceeds obtained from a criminal offense when the defendant transfers them." . . . In the case of "fraudulent schemes,"[1] the funds become proceeds of a criminal offense "at the latest when the scheme succeeds in disgorging the funds from the victim and placing them into the *control* of the perpetrators" . . . Finally, "[c]ontrol is established once money is placed into a perpetrator's account."

Nguyen, 504 F.3d at 570-71. The Sixth Circuit's holding in *Rayborn* creates a conflict with *Leahy* and *Nguyen*. Under *Rayborn*, the "proceeds" were under the petitioner's control *before* they were "disgorged" from Wells Fargo. *Nguyen* establishes a chronological pattern of disgorging the funds from the victim and having the perpetrator obtain control only when the money is placed into his bank account.

The panel decision also blurs any practical or significant distinction between the offenses of money laundering and mail fraud. The indictment herein charged that the mail fraud involved a "scheme to defraud and to obtain money by means of false and

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[1] The specified unlawful activity in this case, mail fraud, was alleged as a part of a fraudulent scheme.

fraudulent pretenses . . . " *United States v. Kennedy*, 64 F.3d 1465, 1478 (10th Cir. 1995), said that the "factual difference" in the two crimes "is important because Congress clearly intended the money laundering statutes to punish new conduct that occurs after the completion of certain criminal activity, rather than to create an additional punishment for that criminal activity." In this case, however, Wells Fargo's wiring of the funds, which the panel said was the separate and distinct act of money laundering, was the precise conduct which was alleged to be a part of the scheme in the underlying mail fraud. *See United States v. Butler*, *supra*, 211 F.3d at 830 ("the laundering of funds cannot occur in the same transaction through which the funds first become tainted by crime.").

In *Kennedy*, the defendant was convicted of money laundering under Title 18 U.S.C. § 1956, which does not necessarily require a transaction with a banking institution. The underlying offense was mail fraud, and the government contended that the money laundering occurred when the defendant deposited various checks from lenders into a bank account. The court distinguished *Johnson*, a wire fraud case, since the defendant made numerous mailings prior to receiving the funds from investors:

> Thus, unlike in *Johnson*, the illegal mailings in this case involved discrete, earlier mailing by Kennedy, rather than the receipt of funds by Kennedy from his victims. *It was the subsequent and distinct transfers of funds that*

> *were alleged as the separate transactions involving "proceeds of specified unlawful activity" which constituted the alleged money laundering under § 1956.*

Kennedy, 64 F.3d at 1478 (emphasis added). The court noted that the mail fraud scheme is complete when the defendant uses the mail in the execution of the scheme. "Thus, because the money deposits in Kennedy's case occurred after other mailings had already completed the predicate mail fraud crime, those transfers properly could be construed as new transactions involving the proceeds of mail fraud." *Id.* Notably, unlike the *Rayborn* court, *Kennedy* nowhere intimates that the requisite control of the funds by the defendant was present *before* the monies were deposited into the defendant's account.

The petitioner submits that monies in the hands of a mail fraud victim are not "proceeds" of criminal activity because the defendant lacks the essential control over the funds to meet the requirement of "obtaining" the funds as required by Title 18 U.S.C. § 1957(f)(2). The *Rayborn* opinion seems to be alone in its broad definition of "control," and the petitioner would respectfully urge this Honorable Court to grant the petition for certiorari in order to resolve the conflict in the judicial circuits.

ISSUE TWO: When the trial court gives a jury instruction on deliberate ignorance, is the instruction harmless as a matter of law so long as the instruction accurately states the law, even if there is no evidence

in the record to support a claim of deliberate ignorance?

Rayborn quoted the petitioner's theory on page 46 of his appellate brief as to why the deliberate ignorance instruction was improper:

> If, in fact, the defendant was a coconspirator with Bullock, who prepared the returns, then the defendant necessarily had to sign the returns with actual knowledge of their fraudulent content. On the other hand, if the defendant relied in good faith on Bullock to prepare the loan documents properly, then he must have had no knowledge that the contents were fraudulent.

Rayborn, 491 F.3d 520. The petitioner's brief also alludes to the jury instruction quoted by *Rayborn*, 419 F.3d at 519: "If you find beyond a reasonable doubt that the defendant signed the tax return, that is evidence from which you may but are not required to find or infer that the defendant had knowledge of the contents of the return." The petitioner added on page 47 of his brief that the combination of this permissive inference instruction and the deliberate ignorance instruction "[w]hen considered together, . . . greatly prejudiced the defendant's good-faith defense, and [was] not harmless beyond a reasonable doubt."

The court first said that if the permissive inference instruction was erroneous, any error would be harmless. Although the court said that the deliberate ignorance instruction "may have been proper here

. . . ," and that it was "inclined to agree with the district court" that the evidence was sufficient to support the instruction; the court added that even if the instruction were improper, any error would be harmless. The court relied heavily upon its prior decision in *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995), which held that the giving of the pattern instruction on deliberate ignorance was harmless error as a matter of law if there was insufficient evidence to support the instruction:

> The Sixth Circuit's Pattern Jury Instruction on deliberate ignorance, by its own terms, only applies when there is sufficient evidence to support a finding of deliberate ignorance beyond a reasonable doubt. In the present case, even if we assume that there was insufficient evidence to justify giving the instruction, the jury, in following the instruction, must *not* have convicted the defendant on the basis of deliberate ignorance. Rather, it must have convicted on the basis of Mari's positive knowledge, for which there was certainly sufficient evidence to support a conviction.

Mari, 47 F.3d at 785.

Mari cited *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466 (1991), where the Supreme Court upheld a general verdict in a conspiracy conviction even though there was insufficient evidence to support one of the two alleged objects of the conspiracy.

Mari believed that the principles of *Griffin* should control:

> The holding by the Supreme Court is that where a jury is charged that a defendant may be found guilty on a factual theory that is not supported by the evidence and is charged on a factual theory that is so supported, and the only claimed error is the lack of evidence to support the first theory, the error is harmless as a matter of law. We therefore hold that giving the Sixth Circuit Pattern Jury Instruction on deliberate ignorance was harmless as a matter of law . . .

Mari, 47 F.3d at 786. When a court gives a deliberate ignorance instruction which is unsupported by the evidence, " . . . the jury will not base the guilty verdict on the instruction. Rather it will consider the theory, and then dismiss it for what it is – mere surplusage, a theory of scienter that is insufficient to support the conviction." *Id.* The court disagreed with the Ninth's Circuit holding in *United States v. Sanchez-Robles*, 927 F.2d 1070, 1075 (9th Cir. 1991), that if the evidence does not support the instruction, "the verdict must be reversed if the record merely 'accommodates a construction of events that supports a guilty verdict, but it does not compel such a construction.'" *Mari*, 47 F.3d at 787.

Based upon *Mari*, *Rayborn* stated that:

> Because the jury was properly instructed on the elements for these specific intent crimes, and if, as Rayborn contends, the evidence

> could have *only* supported a finding that he either knew about or did not know about the falsity of the contents of the forms, the jury must have concluded that Rayborn had actual knowledge of the forms' contents . . .

Rayborn, 491 F.3d 521. The court also said that any error was "entirely harmless" for the further reason that the government presented substantial evidence of actual knowledge. *Id.*

Other circuits have disagreed with the *Mari* analysis on the potential prejudicial impact of an erroneously-given deliberate ignorance instruction. The Fifth Circuit rejected the bright-line rule that the instruction can never be harmless:

> If the only time it is error to give the instruction is when the evidence does not support it, but when there is no evidence to support giving the instruction it is always harmless error to do so, then giving the instruction can never be reversible error. We cannot assume that in every instance in which the evidence does not support the deliberate ignorance instruction the jury will disregard it. We have repeatedly stated that the instruction should rarely be given because it possesses a danger of confusing the jury.

United States v. Mendoza-Medina, 346 F.3d 121, 134 (5th Cir. 2003).

In *United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992), the trial court gave a deliberate ignorance instruction without sufficient evidentiary support.

The Eighth Circuit said that the conviction is not "automatically reversed" when the instruction is erroneously given, but it noted that the "improper use of the willful blindness instruction does affect constitutional rights because it creates the risk that the defendant will be convicted because he acted negligently or foolishly." *Barnhart*, 979 F.2d at 652. The test for determining whether the error was harmless is whether it is "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" without the error. *Id.* (citations omitted). The court found that the error was not harmless beyond a reasonable doubt and it reversed the defendant's conviction. *Id.*, 979 F.2d at 653.

The court in *United States v. Hilliard*, 31 F.3d 1509 (10th Cir. 1994), also found that an improperly given deliberate ignorance instruction was reversible error. The court quoted *United States v. Manriguez Arbizo*, 833 F.2d 244, 249 (10th Cir. 1987): "The danger in giving the deliberate ignorance instruction where there is direct evidence of knowledge but no evidence of avoidance of knowledge is that the jury could still convict a defendant who merely should have known about the criminal venture." *Hilliard*, 31 F.3d at 1517. The court found that the evidence was not "so compelling that we may declare the error of tendering a deliberate ignorance instruction harmless error." *Id.*

The evidence in *United States v. Mapelli*, 971 F.2d 284 (9th Cir. 1992), a tax evasion prosecution, was insufficient to warrant a charge of deliberate

ignorance, and the trial court committed error in doing so. In its finding that the error was prejudicial to the defendant, the appellate court said:

> We cannot find harmless error in the deliberate ignorance instruction. Like may tax evasion cases, the issue in this case was not what was done, but the state of mind with which it was done. The prosecutor read the deliberate ignorance instruction in is closing argument, using it effectively to assist the jury in evaluating the mental element. As the evidence in this case developed, the government had to prove that Mrs. Mapelli was lying. Since there was insufficient evidence of deliberate ignorance, the effect of this instruction, if it had an effect, could only have been to enable the jury to convict it they thought she was ignorant of the skimming but careless in not finding out. That is not the criminal state of mind required for conviction.

Mapelli, 971 F.2d at 287.

In the unpublished case of *United States v. Ebert*, 178 F.3d 1287 (Table), 1999 WL 261590 (4th Cir. 1999), the court cited *United States v. Stone*, 9 F.3d 934 (11th Cir. 1993), which, like *United States v. Mari*, *supra*, held that a deliberate ignorance instruction which properly states the law is harmless error. In examining the conflict among the circuits on this issue, the court said:

> As least two other circuits have adopted *Stone*'s rule that an unsupported ostrich

instruction is harmless error *per se*. *See United States v. Mari*, 47 F.3d 782, 785-787 (6th Cir. 1995) (following *Stone*); *United States v. Adeniji*, 31 F.3d 58, 63-64 (2nd Cir. 1994) (following *Stone*, but also concluding that the evidence of actual knowledge was overwhelming); *cf. also United States v. Scott*, 37 F.3d 1564, 1578 (10th Cir. 1994) (holding that it was harmless error when the court's general ostrich instruction was supported only for some of the defendants and citing *Stone*). However, four other circuits have expressed the view that the giving of an unsupported ostrich instruction can be reversible error even if there was sufficient evidence to support the conviction on an alternative basis. *See, e.g., United States v. Covington*, 133 F.3d 639, 645 (8th Cir. 1998); *United States v. Aguilar*, 80 F.3d 329, 333 (9th Cir. 1996); *United States v. Hilliard*, 31 F.3d 1509, 1517 (10th Cir. 1994); *United States v. Barnhart*, 979 F.2d 647, 652-53 n.1 (8th Cir. 1992); *United States v. Mapelli*, 971 F.2d 284, 285-87 (9th Cir. 1992); *United States v. Ojebode*, 957 F.2d 1218, 1228-29 (5th Cir. 1992); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1075-76 (9th Cir. 1991); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1412-13 (10th Cir. 1991).

In the present petition, there was no evidence which would have justified a deliberate ignorance instruction. The petitioner was charged with the specific intent crimes of mail fraud and conspiracy. The government's theory of the case was that the

petitioner conspired with the co-defendant, Larry Bullock, to submit fraudulent documentation, including altered tax returns, in order to obtain money from the lender, Wells Fargo, and purchase a home in Collierville, Tennessee. The petitioner raised a good-faith defense in the trial court and contended that he signed the tax returns without knowledge of their fraudulent content. The petitioner either had actual knowledge of the contents or no knowledge, and thus the deliberate ignorance instruction was inappropriate. When considered with the other erroneous instruction permitting the jury to make the permissive inference that the petitioner's signature on the returns indicated that he had knowledge of the contents, the deliberate ignorance instruction was prejudicial error.

The petitioner respectfully submits that this Honorable Court should grant this petition for writ of certiorari in order to resolve the conflict between the circuits on the effect of the deliberate ignorance instruction when there is no evidentiary support for the instruction. This issue is one of constitutional significance which needs clarification from the Supreme Court.

CONCLUSION

For the aforementioned reasons, pursuant to Rule 10.1, Rules of the Supreme Court, the petitioner, Gerald Rayborn, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

This the 16th day of January, 2008.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. GERALD RAYBORN, *Defendant-Appellant.*	No. 05-6742

Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 04-20177 – J. Daniel Breen, District Judge.

Argued: April 17, 2007

Decided and Filed: July 2, 2007

Before: MARTIN and DAUGHTREY, Circuit Judges; SCHWARZER, District Judge.*

COUNSEL

ARGUED: K. Jayaraman, Memphis, Tennessee, for Appellant. Kevin P. Whitmore, ASSISTANT UNITED STATES ATTORNEY, Memphis, Tennessee, for Appellee. **ON BRIEF:** K. Jayaraman, Memphis, Tennessee, for Appellant. Kevin P. Whitmore, ASSISTANT

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* The Honorable William W Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

UNITED STATES ATTORNEY, Memphis, Tennessee, for Appellee.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Defendant Gerald Rayborn was charged with one count of conspiracy to commit mail fraud, wire fraud, and money laundering in violation of 18 U.S.C. § 371, two counts of aiding and abetting mail fraud in violation of 18 U.S.C. §§ 1341 and 2, and money laundering in violation of 18 U.S.C. § 1957. Following a jury trial, he was convicted on all counts, and now brings this appeal. For the reasons below, we **AFFIRM** Rayborn's conviction.

I. BACKGROUND

Gerald Rayborn was a pastor at the Mt. Sinai Missionary Baptist Church in Memphis, Tennessee. He had hired Larry Bullock, a Certified Public Accountant (CPA), to be his personal accountant as well as the church's accountant. In 1999, Bullock began preparing tax returns for Rayborn and his wife, Bonnie Rayborn. The Rayborns claimed at trial that they had never prepared their tax returns and they did not understand how to prepare them. Further, according to Ms. Rayborn's trial testimony, neither she nor her husband read their tax forms before signing them.

In 2002, after living at 102 Armstrong in the Whitehaven area of Shelby County for thirty years, Gerald and Bonnie Rayborn entered the housing market to find a new home. Apparently, they had originally decided to remodel their old home, but while they were in Bullock's office working on their taxes, Bullock suggested that they instead purchase a new home. Bullock introduced the Rayborns to Marion Brown, a mortgage broker who was coincidentally in Bullock's office at the time. Brown referred real estate agent Vinnie Flynn to them. The Rayborns told Flynn that they desired a home that had several bedrooms and a fishing pond, and were looking to spend about $475,000. Flynn eventually located a home that the Rayborns liked, and the parties negotiated a sale price of $525,000. The closing date was set for April 29, 2002.

Rayborn, with the assistance of Brown, applied for a mortgage loan through Wells Fargo Mortgage. A document verifying Rayborn's income and employment and signed by Bullock was included in the loan package. Wells Fargo also required Rayborn to include copies of his 2000 and 2001 federal tax returns so it could calculate Rayborn's average monthly income, which, in turn, would determine his loan eligibility. All loan materials received by Wells Fargo were sent via Federal Express. The Rayborns' 2000 and 2001 tax returns listed their adjusted gross income (AGI) as $84,274 and $103,206, respectively. Wells Fargo calculated an average monthly income of $6,788. After Rayborn agreed to pay off some personal

consumer loans, Wells Fargo approved the mortgage loan. The home purchase was completed on May 20, 2002. On that date, Rayborn signed a promissory note for $498,750.00, which required monthly payments of $3,318.20. Also on May 20, 2002, Wells Fargo wired most of that amount on Rayborn's behalf to the closing agent. Rayborn was required to re-sign the documents that were part of his original loan package.

Four months later, on August 29, 2002, the Rayborns, through their mortgage broker, applied to Wells Fargo for a refinancing loan. Rayborn resubmitted copies of the 2000 and 2001 tax returns used to obtain the original loan. Wells Fargo originally denied the loan due to Rayborn's excessive obligations and insufficient income. In response, Rayborn submitted a lease to Wells Fargo that indicated he was leasing his former residence to one "Stacey Johnson" for $1,300 a month. The lease appears to be signed by Gerald Rayborn and Johnson, who is in fact Rayborn's daughter. Wells Fargo was unaware of the relationship between Rayborn and Johnson. With this increase in income, along with Rayborn's agreement to pay off several credit cards, Wells Fargo approved the refinancing loan. On October 7, 2002, Rayborn signed another promissory agreement, this time for $486,000.00. This promissory note also contains Bonnie Rayborn's signature. Wells Fargo wired $483,171.08 to the closing agent. These funds were used to pay off the original mortgage with Wells Fargo.

Although Wells Fargo believed that the 2000 and 2001 tax returns it received were the same tax returns that the Rayborns had submitted to the IRS, they were not. The tax returns that were submitted to the IRS provided that in 2000 and 2001, the Rayborns actually had an AGI of $7,462 and $20,634, respectively. Such income would make a the financing of a $525,000 home far beyond their means.

With respect to the lease submitted to Wells Fargo, Stacy Johnson testified at Rayborn's trial that she never paid $1,300 a month to her father, and had never signed, nor even seen, the lease. The lease document itself contained some suspicious inconsistencies. While Johnson's first name is spelled S-T-A-C-Y, the signature on the lease reads S-T-A-C-E-Y. In addition, at the top of the lease it correctly states the home address to be "102 Armstrong," but farther down it misstates the address as "108 Armstrong."

Charlotte Ware, a forensic document examiner for the United States Postal Inspection Service, examined the signatures on the tax returns filed with the IRS and Wells Fargo. According to Ware's testimony at Rayborn's trial, she concluded that Rayborn signed his name on the 2001 return filed with the IRS and the 2001 return submitted to Wells Fargo, and that Rayborn probably signed his name on the 2000 Wells Fargo return. In addition, she testified that Bullock probably signed Bonnie Rayborn's name to the 2001 IRS tax return. Bonnie Rayborn testified that she did not sign her name to the 2001 IRS return or the 2000 Wells Fargo return (her signature was

not on the 2000 Wells Fargo return). Ms. Rayborn also identified Gerald Rayborn's signature on the 2000 Wells Fargo return, and testified that the IRS returns, but not the Wells Fargo returns, were consistent with her husband's income during that time period. She testified that she was unaware of the Wells Fargo returns, and had never authorized Bullock, or anyone else, to send tax returns to Wells Fargo on her behalf.

On April 7, 2004, a federal grand jury returned an indictment against Gerald Rayborn, charging him with one count of conspiracy to commit mail fraud, wire fraud, and money laundering in violation of 18 U.S.C. § 371, two counts of aiding and abetting mail fraud in violation of 18 U.S.C. §§ 1341 and 2, and money laundering in violation of 18 U.S.C. § 1957. On July 18, 2005, the jury convicted Rayborn of all four counts. He was sentenced to nine months' imprisonment followed by three years' supervised release. He now appeals his conviction.[1]

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[1] Larry Bullock was indicted along with Rayborn and tried separately. Bullock was charged with one count of conspiracy to commit mail fraud, wire fraud, and money laundering in violation of 18 U.S.C. § 371, and two counts of aiding and abetting mail fraud in violation of 18 U.S.C. §§ 1341 and 2. On June 9, 2005, the jury convicted Bullock of all three counts. He was sentenced to three months' imprisonment, three months' home confinement, and three years' supervised release. Bonnie Rayborn was also charged with her husband and Bullock, but later dismissed from the indictment.

II. ANALYSIS

A. Sufficiency of the Evidence for Conviction Under 18 U.S.C. § 1957

After the defense rested, it renewed its motion for acquittal as a matter of law. The court denied this motion for the first three counts, but deferred its ruling on the fourth count (money laundering). The district court ultimately decided, after looking over the indictment, that there was enough evidence to send all four counts to the jury. On appeal, Rayborn contends the evidence presented at his trial was insufficient to sustain his conviction for money laundering.[2]

There are five required elements that the jury had to find in order to convict Rayborn of violating 18 U.S.C. § 1957: (1) Rayborn was engaged in a monetary transaction; (2) Rayborn knew that the transaction involved criminally derived property; (3) the property was greater than $10,000; (4) the property was derived from a violation of 18 U.S.C. § 1341 (mail fraud); and (5) the transaction occurred in the United States. The only issue raised on appeal is whether the second element – that the transaction involved "criminally derived property" – is satisfied. Section 1957 provides that "the term 'criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense." 18

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[2] The money laundering count against Rayborn pertained to the original loan, issued on May 20, 2002.

U.S.C. § 1957(f)(2). This means that "the funds must represent proceeds from some form of activity that constitutes a felony." *United States v. Prince,* 214 F.3d 740, 747 (6th Cir. 2000).

In *Prince,* the underlying felony from which the proceeds were derived was wire fraud. *Id.* In order to sustain conviction, the government had to prove that the proceeds of the wire fraud were then used to commit the money laundering offense. *Id.* at 748. *See United States v. Butler,* 211 F.3d 826, 829 (4th Cir. 2000) ("Congress did not fashion the money laundering statute to create a new source of criminal liability for every fraudulent monetary transaction. Rather, both the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring *after* proceeds have been obtained from the underlying unlawful activity." (emphasis added and internal quotation marks and citations omitted)). Additionally, the government did not need to prove that Prince had physical possession of the property in order to prove that the money constituted "proceeds." *Prince,* 214 F.3d at 748.

The government's theory of the case is that Rayborn committed his underlying felony, mail fraud, by sending fraudulent documents to Wells Fargo in order to procure a loan. As a result of that criminal offense he received proceeds – the $498,750 loan. Then, subsequent to obtaining these criminally derived proceeds, the money was transferred by Wells Fargo to the closing agent in order to facilitate the purchase of the home. This constituted "laundering"

through the commission of a monetary transaction with the ill-begotten funds. *See Butler,* 211 F.3d at 829.

Rayborn argues that his conviction cannot stand because he never obtained these funds or exercised control over them until after Wells Fargo transferred the funds (the alleged monetary transaction). According to his brief, "[u]nder no possible reading of *Prince,* or any logical reasoning whatever, could the defendant be said to have been in control of the funds prior to the time Wells Fargo wired them to the closing attorney." Appellant's Br. at 32. We disagree. The first step in the scheme was the commission of the underlying offense of mail fraud, which occurred when Rayborn sent fraudulent tax documents and other loan application materials to Wells Fargo. After receiving these documents, Wells Fargo approved a loan in the amount of $498,750, which constituted the proceeds of the predicate offense. At that moment, those proceeds belonged to Rayborn; the fact that proceeds were never in Rayborn's physical possession, or even in a personal bank account, is of no moment. *Prince,* 214 F.3d at 748. After all, Rayborn signed documents directing Wells Fargo to transfer the funds to the closing agent. Thus, he exercised control over the proceeds of the mail fraud. *See United States v. Savage,* 67 F.3d 1435, 1443 (9th Cir. 1995) (finding that for purposes of § 1957, where proceeds derived from mail fraud were deposited into accounts, it was irrelevant that these accounts were not in defendant's name, since defendant exercised control over the

accounts). This subsequent transaction, which ultimately resulted in the acquisition of title to the home, constituted the "laundering" of the proceeds of the mail fraud. For these reasons, there was sufficient evidence to sustain Rayborn's money laundering conviction.

B. Bullock's Alleged Statement to Ms. Rayborn

According to Ms. Rayborn, when the Rayborns and Bullock were at the federal building to be processed after the indictment was issued, Bullock was pacing back and forth and said to her, "Ms. Rayborn, I'm sorry I got y'all down here." Outside the presence of the jury, defense counsel questioned her about this hearsay statement and moved to have it admitted under Fed. R. Evid. 804(b)(3) as a statement against penal interest by an unavailable witness. The government objected. Rayborn argues that Bullock was "basically [ ] saying he's sorry he got them down here, that it's his fault and goes to that point." Appellant's Br. at 16. The district court held that the statement was inadmissible. This ruling is reviewed for abuse of discretion. *United States v. Hilliard,* 11 F.3d 618, 619 (6th Cir. 1993).

Even if we were to hold that the district court abused its discretion by refusing to admit the statement, we are convinced that such error would be harmless. "The harmless error standard calls for reversal when the appellate court lacks a fair assurance that

the outcome of a trial was not affected by evidentiary error. We shall, therefore, reverse the lower court only if we are firmly convinced that a mistake has been made." *McCombs v. Meijer, Inc.*, 395 F.3d 346, 358 (6th Cir. 2005) (citations and quotation marks omitted).

First, there was substantial evidence presented at trial – in testimonial and documentary form – establishing Rayborn's guilt. And while it is true that the nature of Rayborn's defense was that he was ignorant and misinformed by his accountant, he had ample opportunity to present evidence in support of this defense. This evidence included testimony by Ms. Rayborn, and as the guilty verdict demonstrates, the jury did not find her testimony credible. Thus, it is quite likely that the jury would not have believed her in this instance either. Furthermore, the jury could have found that *she* had been kept in the dark, but that Rayborn himself had not been so misinformed. Such a finding would be supported by testimony that Rayborn had signed fraudulent documents, and evidence indicating that he was more deeply involved with the family finances than Ms. Rayborn (for example, the fact he paid off personal debts in order to secure both loans). Finally, Bullock's alleged statement is quite vague, and is by no means a slam dunk admission of guilt. The jury could have found that it was not necessarily any more exculpatory than the other evidence that Rayborn presented at trial. Based on our review of the trial record, we cannot say that we are "firmly convinced that a mistake has been

made." *Id.* at 358. Therefore, any error was harmless and does not warrant a new trial.

C. Jury Instruction Regarding Rayborn's Knowledge of the Contents of the Tax Returns

The government requested that the district court give the following instruction to the jury:

> If you find beyond a reasonable doubt that the defendant signed the tax return, that is evidence from which you may but are not required to find or infer that the defendant had knowledge of the contents of the return.

The government argued that this instruction was derived from Internal Revenue Code § 6064. However, as defense counsel pointed out to the district court, this section actually states: "The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document *was actually signed by him*." 26 U.S.C. § 6064 (emphasis added). The statute does not refer to the signer's *knowledge* of the contents of the return. The district court agreed with defense counsel that the language of the statute is different than the language of the government's proposed instruction. Nevertheless, it ruled that it would give the instruction, explaining that "because what they say is it provides simply a permissible inference and that it doesn't draw away, it doesn't defeat in this case the

defendant's position that he relied on a tax professional's advice as a defense, which in some respects I think is what Mr. Rayborn is arguing in this case." Rayborn argues that although he never disputed signing the forms, he based his defense on the theory that he did not know the contents of the forms, and this instruction impermissibly allowed the jury to infer his knowledge, "which would be both practically dispositive of the issue of guilt and directly contrary to the good-faith defense." Appellant's Br. at 43. We review the jury instructions given by a district court for abuse of discretion. *Prince,* 214 F.3d at 761.

In a similar case, our sister circuit held the district court erred in instructing the jury that a tax return signed by the defendant created a rebuttable presumption that the defendant signed the return and had knowledge of its contents. *United States v. Trevino,* 419 F.3d 896, 902 (9th Cir. 2005). The Ninth Circuit found that § 6064, upon which this instruction was based, did not support this presumption. *Id.* But even if we were to hold that the district court erred by adopting the government's proposed instruction, which in no way reflected the actual language of § 6064, this error does not require a new trial. The instruction in *Trevino,* which the Ninth Circuit found was a harmless error, was far more damning, as it told that jury that the defendant's signature created a rebuttable presumption of her knowledge. Here, on the other hand, the jury was simply informed if they found beyond a reasonable doubt that Rayborn had signed the returns, it *may* make such a finding or

inference. Further, we have little doubt that even without the instruction, the jury would have, on its own, made the logical leap that Rayborn's signature indicated that he may have had knowledge of the contents. *See United States v. Wainwright,* 413 F.2d 796, 802 (10th Cir. 1969). In fact, this instruction may have been helpful to Rayborn, as it informed the jury that they were "*not required* to find or infer that [Rayborn] had knowledge of the contents of the return." (Emphasis added.) Therefore, we find that this error was harmless.

D. Jury Instruction Regarding Deliberate Ignorance

Defense counsel also objected to the proposed jury instruction on deliberate ignorance,[3] arguing that the issue before the jury was whether Rayborn knew that the returns he signed were not the ones

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[3] This instruction, which was modeled after Section 2.09 of the Sixth Circuit Pattern Instructions, provided, in pertinent part:

> But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the tax returns he signed for the years 2000 and 2001, which were submitted to support his application for a mortgage and the application to refinance the loan, were false, and that the defendant deliberately closed his eyes to what was obvious. Carelessness or negligence or foolishness on his part is not the same as knowledge and is not – this, of course, is all for you to decide.

submitted to the IRS, and that there was no evidence that Rayborn deliberately avoided obtaining knowledge of the returns' contents. The district court overruled this objection, noting that "I think there certainly is at least inferentially, if not directly, . . . some indication here that Mr. Rayborn could have or may have ignored some probability, high probability that the, because again, as [defense counsel] indicated, I don't think there has been any dispute here that the defendant signed both sets of tax returns." In his brief, Rayborn argues that the deliberate ignorance theory "has no place in a case of this nature," because the crimes he allegedly committed were specific intent crimes. Rayborn contends:

> [i]f, in fact, the defendant was a coconspirator with Bullock, who prepared the returns, then the defendant necessarily had to sign the returns with actual knowledge of their fraudulent content. On the other hand, if the defendant relied in good faith on Bullock to prepare the loan documents properly, then he must have had no knowledge that the contents were fraudulent.

Appellant's Br. at 46.

In support of his argument, Rayborn cites *United States v. Mendoza-Medina,* where the Fifth Circuit held that the district court's giving of an deliberate ignorance instruction was in error because the evidence indicated that the defendant either knew about or did not know about the drugs in his vehicle, foreclosing the possibility of deliberate ignorance. 346

F.3d 121, 134 (5th Cir. 2003). However, *Mendoza-Medina* also explained that "in some cases evidence of actual knowledge can be interpreted as evidence of a subjective awareness of a high probability of the existence of illegal conduct." *Id.* (citing *United States v. Lara-Velasquez,* 919 F.2d 946, 952 (5th Cir. 1990)). Given the facts presented at Rayborn's trial, even under *Mendoza-Medina,* a deliberate ignorance instruction may have been proper here. Therefore, we are inclined to agree with the district court that the evidence presented in this case supported a deliberate ignorance instruction.

Even assuming *arguendo* that the instruction was given in error, "a legally-erroneous jury charge will not justify reversal of a conviction if its probable effect on the verdict was inconsequential." *United States v. Carney,* 387 F.3d 436, 449 (6th Cir. 2004). This Court has explained that even when it is unsupported by evidence, a deliberate ignorance instruction that properly states the law is harmless error. *United States v. Mari,* 47 F.3d 782, 786 (6th Cir. 1995) (citing *Griffin v. United States,* 502 U.S. 46, 55-56 (1991)). This Court will not overturn a jury's verdict so long as sufficient evidence supports one of the grounds for conviction. *Id.* Here, any error was undoubtedly harmless. First, Rayborn has not argued that the instruction misstated the law on deliberate ignorance. Further, Rayborn does not claim that the district court failed to properly instruct the jury that they must find beyond a reasonable doubt that Rayborn committed all elements of the crimes alleged.

See United States v. Hoffman, 918 F.2d 44, 46-47 (6th Cir. 1990). Because the jury was properly instructed on the elements for these specific intent crimes, and if, as Rayborn contends, the evidence could have *only* supported a finding that he either knew about or did not know about the falsity of the contents of the forms, the jury must have concluded that Rayborn had actual knowledge of the forms' contents. *See Mari,* 47 F.3d at 785. "To conclude otherwise, i.e., that the jury actually convicted on the basis of deliberate ignorance even though insufficient evidence supported that theory, we would have to assume that the jury ignored the jury instructions." *Id.* In addition, the instructions cautioned the jury that evidence of negligence or foolishness was insufficient. *See id.* (explaining that Section 2.09 of the Sixth Circuit Pattern Instructions forecloses the possibility of causing the jury to convict on the basis of negligence). Finally, the government presented substantial evidence indicating that Rayborn had actual knowledge of the inaccurate information submitted to Wells Fargo. *See Mendoza-Medina,* 346 F.3d at 134-35 ("[A]n error in giving the deliberate ignorance instruction is harmless where there is substantial evidence of actual knowledge." (citations and quotation marks omitted)). Thus, any error in giving a deliberate ignorance instruction was entirely harmless.

E. District Court's Failure to Give a "Good-Faith Defense" Instruction

Finally, Rayborn argues that the district court erred by refusing to instruct the jury on the good-faith defense to fraud, found in Section 10.04 of the Sixth Circuit Pattern Instructions. Rayborn's defense was that he relied in good faith on Bullock, his accountant, to properly prepare the loan documents. He contends that he never realized the 2000 and 2001 tax returns prepared for Wells Fargo were incorrect, and that he never engaged in fraudulent conduct. "[W]e have held that it is error to fail to instruct on the defendant's theory of the case." *United States v. McGuire,* 744 F.2d 1197, 1201 (6th Cir. 1984). Rayborn argues that given the "numerous examples of evidence" of his good-faith reliance on Bullock, his right to a fair trial was severely prejudiced.

Unfortunately for Rayborn, however, he failed to ask for a good-faith instruction at trial. As such, we will only review his claim for plain error. *Wood,* 364 F.3d at 708. "An error is plain when it is obvious, affects substantial rights, and seriously affects the fairness or integrity of judicial proceedings." *United States v. Lopez-Medina,* 461 F.3d 724, 739 (6th Cir. 2006). "Moreover, an improper jury instruction will rarely justify reversal of a criminal conviction when no objection has been made at trial, . . . and an omitted or incomplete instruction is even less likely to justify reversal, since such an instruction is not as prejudicial as a misstatement of the law." *United*

States v. Hook, 781 F.2d 1166, 1172-73 (citing *Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977)).

Here, the district court did not commit plain error. First, the prosecution presented a great deal of evidence against Rayborn, including the fraudulent tax returns and expert testimony concluding that Rayborn signed them, a lease containing Rayborn's signature and a forged signature of his daughter, and the simple fact that Rayborn procured a mortgage loan well beyond his means. Second, Rayborn had the opportunity to present evidence that he relied entirely on Bullock. The failure to instruct the jury on the good-faith defense did not affect Rayborn's substantial rights, or the fairness of the trial. *Lopez-Medina*, 461 F.3d at 739. Accordingly there was no plain error that justifies a new trial.

For the reasons above, Rayborn's conviction is **AFFIRMED**.

No. 05-6742

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,,	)	
Plaintiff-Appellee,	)	ORDER
v.	)	(Filed Nov. 23, 2007)
GERALD RAYBORN,	)	
Defendant-Appellant.	)	

BEFORE: MARTIN and DAUGHTREY, Circuit Judges: and SCHWARZER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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* Hon. William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk